



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO 606 OF 2016

ENG. JOHN OKUNA OGANGO.....PLAINTIFF/RESPONDENT

VERSUS

DOLORES N COLLINS.....1ST DEFENDANT/APPLICANT

COLLINS PARK VILLAS LIMITED.....2ND DEFENDANT/APPLICANT

RULING

INTRODUCTION:

1. Vide Chamber Summons dated 28th February 2020 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following Orders:

- a) *That Leave be granted to the Applicant to file a Reference Out of time on the Ruling and Decision delivered on 30th July 2019, by the Honourable Taxing Master I.N Barasa, taxing the Respondent's Party to Party bill of costs dated 4th October 2017 at Ksh. 2,236,711/=Only.*
- b) *That the Draft Reference on the same, attached herein, be deemed to be duly filed upon payment of the requisite court fees.*
- c) *That the Costs of the Application be provided for.*

2. The Application is premised on the following Grounds;

- (i) *That the Ruling on the present taxation matter was delivered on 30th July 2019, aggrieving the Applicants.*
- (ii) *That a Notice of Objection to the Reference dated 2nd August 2019 was filed on 08th August 2019 requesting for the reasons for the decision.*
- (iii) *That the Taxing Master, vide a letter dated 4th September 2019 and received by the Applicants' Advocates on 5th September 2019 indicated that the reasons were contained in the body of the taxed bill.*
- (iv) *That the Applicants' Advocates instructed their associate to File a Reference.*
- (v) *That the said Associate left the firm without filing the Reference, a matter that was unknown by the firm.*
- (vi) *That the firm only found out on 20th February 2020 while following up on the matter that a Reference had not been filed.*
- (vii) *That it is fair and in the interests of justice that the Applicants herein be allowed to file the reference out of time.*

3. Upon being served with the subject Application, the Respondent filed a Replying affidavit sworn on 8th June 2020, whereby the Respondent has averred that the Application is unmerited, misconceived and made in bad faith.

4. Besides, the Respondent has further stated that Reference in the matter ought to have been made by 14th August 2019, insofar as the

Reasons for the taxation order were Contained and/or provided in the ruling delivered on 30th July 2019.

5. On the other hand, it has also been contended that after taxation, the issue of the payment of the purchase price was concluded and it would be prejudicial to the Respondent if it was to be reopened.
6. Other than the foregoing, the Respondent has also averred that the Applicants have installed an illegal tenant in the house, illegally collected rent, maliciously and willfully caused wanton damage therein and cannot therefore be allowed to claim some advantage over the Respondent.
7. Finally, the Respondent has also claimed that the Application is an afterthought and has been filed 8 months late without any justifiable reason. Consequently, the Respondent has urged the court to dismiss the application.

SUBMISSIONS:

8. The Parties agreed to dispose of the Application by way of Written Submissions and the proposal herein was accepted and ratified by the Court. In this regard, the Applicant proceeded to and indeed filed their Written Submissions on the 5th July 2021.
9. First and foremost, It is the Applicants' submission that their prayer to file Reference out of time should be indulged since the failure to file same within the stipulated time was occasioned by an inadvertent mistake, which is excusable and thus ought not to be visited upon the Applicant.
10. Besides, the Applicants have further submitted that the extension sought will not prejudice the Respondent, in any manner, whatsoever. In this regard, the Applicants have cited the provisions of **Paragraph 11 of the Advocates Remuneration Order**, and thus contended that the court has power to enlarge time for the filing of a reference.
11. In support of the foregoing submissions, the Applicants have placed reliance on the following Decisions, **Professor Tom Ojienda & Associates Advocates v County Government of Meru [2021]eKLR**.
12. In addition, the Applicants submit that the prejudice to be suffered if the prayer is not granted would be heavier than the prejudice, if any, to be suffered by the Respondent if the prayer is granted.
13. In this regard, the Applicant has relied on the decision in the case of **Blue Nile E.A Ltd v Lydia Gode Yusuf & Another[2018] eKLR**, whereby it is stated that the Court ought to consider the prejudice, if any, that the Applicant is disposed to suffer and weigh same against the prejudice to be suffered by the adverse Party.
14. The Applicants have further contended that the Respondent filed an undated Replying affidavit. In this regard, the Applicant has thus contended that such an Affidavit does not amount to or constitute a Valid Affidavit and thus same should be disregarded.
15. In support of the foregoing, the Applicants have relied on and cited the provisions of Section 5 of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya. Besides, the Applicants' have also relied on the decision in the case of **Gideon Sitelu Konchellah v Julius Lekakeny & 2 Others[2018]eKLR**.
16. In conclusion, the Applicants have invoked and relied on the provisions of **Article 159(2) (d) of the Constitution, 2010**. In this regard, the Applicants have contended that the Court ought to disregard undue reliance on procedural technicalities and therefore endeavor to do substantive Justice.
17. On his part, the Respondent filed submissions on 19th July 2021, wherein the Respondent has essentially reiterated the contents of the Replying Affidavit and further averred that the subject Application is actuated by bad faith and that the name of the alleged associate who failed to file the Reference has not been Disclosed.
18. The Respondent has further submitted that the Draft Reference seeking to be admitted fails to raise serious points of law and neither is same surrounded by exceptional circumstances warranting an interference with the award of cost.
19. Finally, the Respondent has contended that the Replying Affidavit that was filed in Court is duly sworn and dated by the Commissioner of Oaths and in any Event, the failure to date an affidavit, if at all, does not invalidate such an affidavit. In this regard, the Respondent has relied on the Provisions of Order 19 Rules 7 of the Civil Procedure Rules,2010,
20. Be that as it may, the Respondent has contended that the extent and duration of delay, is inordinate and unreasonable and hence the same ought not to be excused. Consequently, the Respondent, has implored the Honourable Court to Dismiss the Subject Application and condemn the Applicants to bear the Costs of the Application.

ANALYSIS AND DETERMINATION:

21. I have considered the contents of the Subject Application, the Supporting Affidavit thereto and the Replying Affidavit filed by the Respondent in opposition thereto, as well as the submissions filed by the parties.
22. First and foremost, it is important to point out that there is no contention on the fact that the Respondent, then Plaintiff, filed a Bill of

Costs against the Applicants on 4th October 2017 and that the Bill of Costs was taxed on 30th July 2019, whereby the same was taxed and certified in the sum of Ksh, 2,236,711.00 only.

23. Besides, It is also conceded that upon the taxation of the Bill of Costs, the Applicant, who was then 1st Defendant, filed a Notice of Objection on 8th August 2019, requesting for reasons for the Taxing Master's decision.

24. Pursuant to the Notice of Objection to taxation by the Applicant herein, the Taxing Master responded to same vide Letter dated 5th September 2019, and in respect of which the Taxing Master observed that the Reasons for the taxation were contained in the Ruling.

25. Although **Paragraph 11 (1) of the Advocates Remuneration Order, 2009** requires for the Taxing Master to give reasons for the taxing decision, this requirement only envisions a situation where a comprehensive ruling has not been made. However, that was not the case in the present instance.

26. In the premises, though the Applicant was still obliged to file and serve the Notice of Objection to Taxation, which was indeed filed, same ought to have filed the Reference immediately, noting that the Reasons were duly contained in the Ruling.

27. In support of the foregoing position, it is worthy to take cognizance of the Decision in the case of **Evans Thiga Gaturu –Vs- Kenya Commercial Bank Limited [2012] eKLR, where Odunga J** observed as follows:-

*“In most cases the court is aware that the taxing officers in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances, **it would be fool hardy to expect the taxing officer to redraft another “ruling” containing reasons.**” (own emphasis)*

28. Besides, the issue at hand was also considered and/ or addressed in the case of **Ahmed Nassir –Vs- National Bank Of Kenya Ltd [2006] E.A, where the Court held as hereunder:**

*“Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. **The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.**” [own emphasis]*

29. Nevertheless, it is not in dispute that no Reference was filed challenging the ruling. It is in this regard, that the Applicants have filed the subject Application and are thus seeking for Leave to be allowed to file the Reference out of time.

30. For clarity, the Applicant explains that the Reference was not filed on account of his Advocate's inadvertence, or excusable omission, which should not be visited upon the Applicants. Consequently, the Applicants have implored the court to enlarge the 14-day window for filing the Reference to afford him an opportunity to file the attached draft Reference.

31. Suffice it to say, that the law dealing with the timelines for filing References is to be found under **Paragraph 11 of the Advocates Remuneration Order**. The Section provides as follows:

‘11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

32. From the foregoing, a party aggrieved by the decision of a Taxing Master is required to file a Reference within 14 days from the date of receipt of the Reasons being availed and/ or advanced by the Taxing Master.

33. In respect to the Subject matter, the Taxing Master indicated that the Reasons for the Taxation were contained in the Ruling that was rendered and hence the Reference ought to have been filed upon Receipt of the Letter by the Taxing Master.

34. However, No Reference was filed within the requisite 14 days and hence the Applicants were obliged to file an application for Leave. Be

that as it may, No Application for such Leave was filed until the present Application was lodged.

35. Nevertheless, though the Court is seized of discretion to enlarge the time set for filing a Reference, it must be observed that this discretion is only exercisable upon the provision of a satisfactory and credible reasons for the Delay and not otherwise.

36. In this regard, The court is guided by the decision in **Republic –Vs- Kenyatta University & Another Ex Parte Wellington Kihato Wamburu [2018]eKLR**, where **Hon. Justice Mativo** held as follows:-

“...The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.”

1.7. However, it is necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretion jurisdiction vested in the court. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration...”

37. On the other hand, the Supreme Court decision in **Salat v Independent Electoral & Boundaries Commission & 7 others [2014]eKLR** is also instructive on the guiding parameters for extension of time.

“Discretion to extend time is indeed unfettered but its incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were extenuating circumstances that could enable the Court to exercise discretion in favour of the applicant. In doing so the following principles are applicable thus:

- (i). Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party.*
- (ii). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.*
- (iii). Whether the Court ought to exercise discretion to extend time, is a consideration to be made on a case to case basis.*
- (iv). Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court.*
- (v). Whether there would be any prejudice suffered, the respondent if the extension was granted.*
- (vi). Whether, the application had been brought without undue delay and*
- (vii). Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”*

38. Based on the foregoing legal premise, it is now appropriate to ascertain whether the reason that has been offered by the Applicant herein, constitutes or amounts to what can be termed as sufficient explanation for the delay and whether same suffices to warrant the extension of time sought.

39. For coherence, the Applicants’ reason for delay is ascribed to inadvertence on the part of their Advocate. It is explained that the associate directed to file the Reference left the firm without doing so, a fact that only became discoverable 7 months later. However, I must point out that the Names of the Associate, who is said to have been deputized to deal with the Filing of the Reference and who left the Lawfirm, has not been supplied and/ or availed to the Court.

40. On the other hand, the Applicants’ have also not stated when, if at all, the Nameless Associate left the Lawfirm and at any rate, why no follow-up, was undertaken by themselves to ascertain whether to instructions to file the Reference, had been acted upon.

41. Suffice it to say, that while litigants ought not to suffer for the transgression and/ or omissions of their advocate, it must be observed that before the Litigant can benefit from the exercise of the discretion of the Court, the concerned Litigant and in this case, the Applicants must show that same acted with due diligence and that same was similarly, proactive and not otherwise.

42. I must observe that cases, and particularly, civil matters belong to their respective litigants. Indeed, **Section 1A of the Civil Procedure Act, Cap 21** in setting out the overriding objectives obligates litigants to assist the court in facilitating the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

43. Consequently, the principal in any suit is therefore the litigant, with the Advocate being his agent. As such, the argument that once a litigant has procured the services of an advocate, they are freed from the obligation of prosecuting or defending their case is misguided. In this regard, the Litigant, is called upon to keep abreast of the going-ons pertaining to his/ her matter or case.

44. In this matter, it is apparent that both the Advocate and the Applicants alike did not exercise due diligence and thus neither of them is entitled to the benefit of Judicial Discretion, which must be exercised judiciously and not otherwise.

45. In support of the foregoing position, I adopt and ratify the Decision in the case of **Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another [2014]eKLR**, where Hon Justice Mutungi held as follows:-

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

46. Perhaps, if more emphasis was necessary, the Decision in the case of **John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR, becomes apt and particularly, where the Court as hereunder:**

“It has been held that a litigant should not suffer due to the transgressions of their Advocates. However, litigants are also duty bound to ensure that their Agents/Advocates attend Court and prosecute the cases as they should. Section 1B of the Civil Procedure Act which refers to the overriding objectives of the Court and gives a further duty to litigants to ensure that their matters are prosecuted without delay and within the minimal judicial resources available and such resources that are less costly. As such the Defendant has a role to play in the course of justice to follow up from Counsel and Court and ensure apt and timely prosecution of matters to enable the Court achieve the overriding objectives.

This Court must be keen not to assist a party who is bent to defeat justice through evasion or indolence. The Court considers the record and expresses concern on the conduct of the defence during the pendency of the suit. The Defendant was served twice and did not enter appearance until the last day when the matter was almost heard. He also took more time to comply and file his defence. His conduct suggests indolence.”

47. On the other hand, it is important to point out that Legal business can no longer be carried out and undertaken with the luxury that was exhibited in the days gone, when the case-load was comparatively low and Backlog was unknown. Today, the Litigants and their Suitors, are reminded of the enactment of the Provisions of Article 159(2) (b) of the Constitution,2010.

48. To amplify the foregoing position, I beg to adopt and re-state the Court of Appeal decision in **Tana And Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** where the court cited the case of **Ketteman & Others Vs Hansel Properties Ltd [1988] 1 All Er 38;** in which Lord Griffith stated that ;

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”

FINAL DISPOSITION

49. In my humble view, the Applicants herein have not established and/ or provided any sufficient basis to warrant exercise of Judicial discretion in their favour. It is not enough to blame the Advocate and/ or attribute the lapse to the Nameless associate, without more.

50. Simply put, the Applicants have not demonstrated any follow-up efforts on their part in relation to the ruling and the intended Reference. At any rate, the Applicants did not even prod their Advocates into action.

51. In the premises, the Application dated the **28th February 2020**, is devoid of merits. Consequently, same be and is hereby Dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT